PACIFIC & ORIENT INSURANCE CO BHD A

v.

PAUL ROZARIO

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL AZIZ RAHIM J
[ORIGINATING SUMMON NO: D24NCC-260-2010]
7 SEPTEMBER 2010

COMPANY LAW: *Winding up - Injunction to restrain petition - Fortuna injunction - Whether court had jurisdiction to grant injunction - Specific Relief Act 1950, s. 54(b) - Whether plaintiff insolvent - Whether plaintiff had made full and frank disclosure - Whether there would be abuse of process if winding up order granted - Whether it was justifiable for defendant to file a winding up petition* C D

CIVIL PROCEDURE: *Ex parte application - Non-disclosure of material facts - Whether plaintiff disclosed all material facts - Whether disclosure alone was sufficient - Whether court's attention should be drawn to disclosed facts - Whether court duty bound to read all disclosed facts - Whether plaintiff made full and frank disclosure - Rules of the High Court 1980, O. 29* E

The defendant's son was killed in an accident involving a collision between his motorcycle and a motorcar driven by one Tan Kok Hen, the plaintiff's insurer's motorcar. The defendant filed an F action against the plaintiff's insurer and was awarded with RM62,596.28 in damages by the Sessions Court. The plaintiff appealed against the decision, and applied for stay of the judgment. Both applications were pending hearing. In the interim, the plaintiff corresponded with the defendant and offered to pay G him the judgment sum in a certain manner pending the outcome of the appeal and the stay application. The defendant refused the offer and filed a winding up petition ('the petition') pursuant to s. 218 Companies Act 1965 against the plaintiff. The plaintiff made this application for a Fortuna injunction to restrain the H defendant from presenting the petition against it. The court, granted an *ex parte* injunction to the plaintiff, and fixed a date for the *inter partes* hearing. The defendant submitted the following in the *inter partes* hearing; (i) that the court did not have jurisdiction to grant the injunction to restrain the proceedings in another court I of co-ordinate jurisdiction or higher pursuant to s. 54(b) Specific

A Relief Act 1950; (ii) the plaintiff was insolvent and it could not pay its debt; and (iii) the plaintiff did not bring to the court's attention the fact that the defendant had given an undertaking that he would not take any action until the stay application was heard. He argued that it was not sufficient to merely disclose all
B material facts; the court's attention should be drawn to them.

Held (allowing the plaintiff's application):

(1) It was held that the court had jurisdiction to grant the injunction. The injunction was not directed against the court
C but against the defendant from filing the winding-up proceedings. It was also noted that injunctive relief should not be used as an instrument of oppression as it would tantamount to abuse of process. Here, the plaintiff accepted that the defendant had obtained judgment before the Sessions Court
D and that it had filed an appeal to set it aside and also filed for stay of the judgment. Nonetheless, the plaintiff had made an offer to the defendant to pay in a certain manner. This offer was made as such with the view of enabling the plaintiff to recover the payment made in the event it was successful in
E the appeal. The plaintiff's offer did not prejudice the defendant. *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* (refd). (para 13)

(2) The plaintiff was willing and had in fact made an offer to pay
F the judgment sum, subject to certain conditions. This showed that the plaintiff could pay the money purportedly owed to the defendant under the judgment. The defendant's argument that the plaintiff's financial statement indicated that it could not even afford to pay dividend could not stand because it was
G taken out of context of the statements made in its financial statement. Based on the above, the plaintiff was found to be solvent. (para 14)

(3) The court had to consider all evidence that was presented
H before it. Thus if the correspondences were disclosed, the court was duty bound to read them in order to ascertain what they really were. Therefore, the disclosure of all the correspondence on the stay application sufficiently met the requirement of full and frank disclosure under O. 29 Rules of
I the High Court 1980. (para 15)

(4) It would be an abuse of process and unfair to the plaintiff if the petition was granted. The defendant should have presented the judgment to the plaintiff and demand for payment pursuant to s. 96(1) Road Transport Act 1987. In the event the plaintiff had refused to do so, then it would be justifiable for the defendant to present for the petition against the plaintiff. (para 18)

Case(s) referred to:

Bakmawar Sdn Bhd v. Malayan Banking Bhd [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323 HC ***(refd)***

Bryanston Finance v. De Vries (No 2) [1976] 1 Ch 65 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Lai Yew Seong v. Chan Kim Sang [1987] 1 CLJ 351; [1987] 1 CLJ (Rep) 151 SC

Pacific & Orient Insurance Co Berhad v. Rusnah Abd Raop [2003] 1 LNS 738 HC ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***

Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd [2010] 2 CLJ 541 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218

Road Transport Act 1987, s. 96(1), (2)

Rules of the High Court 1980, O. 29

Specific Relief Act 1950, s. 54(b)

Specific Relief Act 1963 [Ind], s. 41(b)

For the plaintiff - Dato' Dr Kamalanathan Ratnam (Vinod R Kamalanathan with him); M/s Vinod Kamalanathan & Assocs

For the defendant - Watson Peters (Serena Peters with him); M/s Watson Peters & Mohd Fuad

Reported by Melinda Robert

JUDGMENT

Abdul Aziz Rahim J:

[1] Plaintiff is seeking a Fortuna injunction or non suit injunction to restrain the defendant from presenting a winding-up petition against it arising from the judgment obtained by the defendant in a road accident case in the Sessions Court in Shah Alam Summons No. 53-237-2007.

[2] The defendant's son herein (plaintiff in the Session Court) was riding a motorcycle when he collided into a motorcar driven by Tan Kok Hen the plaintiff's insured and died in the collision. The Session Court found the deceased 20% liable and the plaintiff's insured 80% liable; and awarded the defendant a sum of RM62,596.28 in damages. The evidence is that the deceased had collided into the rear of the plaintiff's insured car. The plaintiff, being liable statutorily to the insured pursuant to s. 96(1) Road Transport Act 1987 has filed an appeal against the award of liability and quantum to the High Court in Shah Alam. The appeal has not been heard. At the same time, the plaintiff also has applied for stay of the Sessions Court judgment; and that too has not been heard. In its appeal the plaintiff is relying on the Federal Court case of *Lai Yew Seong v. Chan Kim Sang* [1987] 1 CLJ 351; [1987] 1 CLJ (Rep) 151 that in the circumstances of the case the duty of care is no the deceased to take care of himself.

[3] In the meantime, the solicitors for the plaintiff and defendant herein have been in correspondence as to the payment under the judgment. The plaintiff has offered to pay the judgment sum to the defendant's solicitors as stake holder with the liberty to release 50% of the sum pending the appeal being heard and also agreed to top up the difference in the interest payable under the judgment and the one paid by the bank if need be. This was refused by the defendant.

[4] The defendant then took out s. 218 notice to wind up the plaintiff. The plaintiff then once again made the offer to pay the judgment sum to the defendant's solicitors and again this was refused. The plaintiff even offered to pay the additional interest up to the 8% awarded by the court since the fixed deposit interest rate is less than 3%. This was also not accepted by the defendant.

[5] The plaintiff then filed the stay application and wrote to defendant's solicitor to withdraw the s. 218 notice pending the hearing of the stay application as the plaintiff is worried that if not withdrawn the 21 days under s. 218 will continue to run and the deeming provision that plaintiff is unable to pay its debt is invoked. There were correspondences on these subject between the solicitors. As to the plaintiff's request for withdrawal of the s. 218 notice there was no response from the defendant's solicitors. Instead, in their correspondences the defendant's solicitors gave undertaking that they will not take any further/fresh step on the 218 notice in any other proceedings/action until the stay application is heard.

[6] Under the above circumstances, the plaintiff filed for an *ex parte* injunction in encl. 3 which was granted and the date for *inter partes* was subsequently fixed for both parties to argue on the injunction.

[7] At the *inter parties* hearing defendant argued that the court has no jurisdiction to grant the injunction to restrain the proceedings in another court of co-ordinate jurisdiction or higher. The court can only restrain proceeding in courts subordinate to it. Defendant relied on s. 54(b) of the Specific Relief Act 1950. The defendant cited the provisions, and commentaries of those provisions, of the Indian Specific Relief Act 1888 for this proposition. The defendant also argued that in this kind of injunction the test applicable is the Bryanstone test (in *Bryanstone Finance v. De Vries (No 2)* [1976] 1 Ch 65) ie, that injunction may be granted if the petition is likely not to succeed. But if it is otherwise the court may refuse the injunction. The test in *American Cyanamid* ie, serious triable issue test is not applicable. The defendant further argued that judgment is a valid judgment and relying on *Pacific Orient Insurance Co Berhad v. Rusnah Abd Raop* [2003] 1 LNS 738 [Justice Kang's decision] and s. 96(1) Road Transport Act 1987, they can enforce the judgment against the plaintiff including taking out a 218 notice.

[8] The defendant also pointed out that based on the plaintiff's group annual report exhibited in the affidavit in the plaintiff's encl. 2, the plaintiff is commercially insolvent and unable to pay its debt.

[9] Defendant also submitted that, there has been a material non-disclosure by the plaintiff in the *ex parte* application in that the plaintiff has failed to bring to the attention of the court to the fact that in their correspondences with plaintiff, the defendant has given undertaking not to take further action in any proceeding until the plaintiff's stay application is heard. It was argued that, had this disclosure been made, the court may not give the *ex parte* injunction. Although the plaintiff has exhibited and disclosed all the correspondences on this matter in the affidavit the defendant submitted that, that is not sufficient. It was argued that on the authorities, attention of the court must be drawn to the disclosed fact.

[10] Section 54(b) of the Specific Relief Act 1950 is very clear that an injunction cannot be granted to stay proceedings in a court not subordinate to that from which the injunction is sought.

A Section 41(b) of the Indian Specific Relief Act 1963 has almost a similar provision but with a twist. In the Indian provision the expression used is 'to restrain any person from instituting or prosecuting any proceedings ...' The cases from India cited by the defendant, and in particular that of *Cotton Corporation of India*
B *Limited v. United Industrial Bank Limited* (at p. 134 of defendant's bundle of authorities encl. 10), have applied this provision literally and have refused such injunction. The defendant also cited the case of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1 where the court has refused an interim
C injunction that has the effect of stay of proceedings in the Syariah Court, based on our s. 54(b) SRA, the Syariah Court being court not subordinate to the High Court. However when the matter went up on appeal to the Federal Court there was no conclusive answer to the issue given by the court.

D

[11] The defendant also relied on the learned Justice Kang Hwee Ghee's decision in *Pacific & Orient Insurance Co Berhad v. Rusnah Abd Raop* [2003] 1 LNS 738; [2003] 6 MLJ 113 where the learned judge held that under s. 96 Road Transport Act 1987 the
E insurer (plaintiff herein) is obligated to pay the person who obtained a judgment against an insured after a certificate of insurance has been duly delivered to the person by whom the policy if effected in respect of any third party risk covered under the policy. The insurer can only avoid the payment where the
F requisite notice of proceeding is not given to the insurer before the commencement of the proceedings; where there is stay of the judgment or where the policy has been cancelled or where the policy has been declared by court as void and unenforceable.

G **[12]** Citing the case of *Bryanston Finance v. De Vries (No. 2)* [1976] 1 Ch 65 CA and *Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd* [2010] 2 CLJ 541, the defendant submitted that the test applicable for granting a non suit injunction is whether the petition is *prima facie* would be an abuse of process. Thus if the
H court finds for example that there is *prima facie* evidence, the debt is *bona fide* disputed then non suit injunction would be issued. It was also argued that the test 'of serious issues to be tried' enunciated in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293 CA has no application in non suit injunctions application.

I

[13] I shall first deal with the issue of jurisdiction of this court to grant the *ex parte* injunction in the light of s. 54(b) Specific Relief Act. To answer this issue I need only to refer to the Court of

Appeal decision in *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* where the court had to deal with s. 54(b) Specific Relief Act in the light of three cases cited therein (see held (d)) and ruled that those cases do not authorize one branch of the High Court to interfere with the proceedings properly seized by another branch of the High Court. Applying this principle I hold that I have the jurisdiction to grant the injunction sought and I also take note that injunction is not directed against the court but against the defendant from filing the winding-up proceedings. In this respect, I also think the Indian provision is differently worded from our provisions. What is pertinent to note in *Jasa Kramat (supra)* is the observation by the court that injunctive relief should not be used as an instrument of oppression; if it is so used then it is an abuse of process. The court there went further to say that circumstances in which the court process may be abused are varied and numerous and the categories not closed and whether the institution of an action or its continuation or a step taken amounts to an abuse of process depends upon particular and individual circumstances. In this case, the plaintiff accepted that the defendant has obtained judgment before the Sessions Court and that it has filed an appeal to set it aside and also filed for stay of the judgment. Nonetheless, the plaintiff has made an offer to the defendant for payment in a certain manner pending the outcome of the appeal and stay application. This offer is with the view of enabling the plaintiff to recover the payment made if the plaintiff is successful in the appeal. In my view, the offer did not prejudice the defendant.

[14] The next question to consider is whether the plaintiff is insolvent and cannot pay its debt. Firstly, it has been shown that the plaintiff is willing and has in fact made the offer to pay subject to conditions. This I think shows that the plaintiff can pay the money purportedly owing to the defendant under the judgment. Secondly, it was argued that based on the plaintiff's financial statement for 2009 the plaintiff cannot even afford to pay dividend. I think this argument cannot stand because it was taken out of context of the statements made in the said plaintiff's financial statement. I therefore find that the plaintiff is a solvent company.

[15] On the issue of material non-disclosure, the fact is that the plaintiff has disclosed all the correspondences relating to the issue of stay and the defendant undertaking not to take further action on the 218 notice pending the disposal of the stay application.

The cases cited by the defendant on this issue have been adequately distinguished by the plaintiff in its written submissions in reply and I do not intend to repeat them here. The argument here is that though the correspondences were exhibited the court attention were not drawn to the fact that there was undertaking by the defendant not to take further action on the s. 218 notice until the determination of the stay application as apparent from the correspondences disclosed. I find such argument defies common sense. My view is that the court has to consider and weigh all the evidence presented before it. Thus, if the correspondences were disclosed and court attention were drawn to those correspondences, the court is duty bound to read them in order to ascertain what they really are or whether they say something else other than what they were meant to say. Then the court should form an opinion on those correspondences and decide whether they support what plaintiff or applicant has submitted. Therefore, I find that disclosure of all the correspondences on the stay application this case is sufficient to meet the requirement of full and frank disclosure under O. 29.

[16] The case of *Bakmawar Sdn Bhd v. Malayan Banking Bhd* [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323 cited by the defendant is distinguishable on this point. In that case the plaintiff has obtained an *ex parte* injunction to restrain the defendant from submitting the details of plaintiff's account to Biro Maklumat Cek Bank Negara and thereby prohibiting the plaintiff from opening a current account with any bank in Malaysia until such time its name has been removed from the "blacklist" issued by the Biro and also to restrain the defendant from taking steps to close the plaintiff's account with the defendant. In that case, the court found as a fact that the Biro has been informed of the details of the plaintiff's account. This particular fact was not disclosed to the court in the plaintiff's application for the *ex parte* injunction. Had this fact been disclosed, the court would not have granted the injunction to restrain the defendant from submitting the details of plaintiff's account to the Biro. Since the plaintiff did not draw the court's attention to the fact that the details of its account has been submitted to the Biro, the court ruled that the plaintiff did not make full disclosure and therefore has mislead the court into believing that the Biro has yet to be informed of the plaintiff's account. In this instance case, the undertaking given by the defendant in respect of the stay application by the plaintiff was clearly discernable from the exchange of correspondences between the parties.

[17] With regard to the application of *Pacific Orient Insurance Co Berhad v. Rusnah Abd Raop (supra)* the court in that case has made a finding at p. 169 of the report that 'at the Sessions Court the plaintiff (*ie* the insurance company) stepped into the shoes of the insured to defend the defendant's claim'; thus it appears therefore that in that case there was judgment directly against the plaintiff therein. In this respect, learned counsel for the defendant herein informed the court that was not so and he knows that for a fact because he was the counsel in that case for the plaintiff. That may be so; but as argued by learned counsel for the plaintiff herein court here should go by what is written in the reported judgment. In the light of this controversy, I refuse to follow *Rusnah*'s case. Moreover I am inclined to agree with the plaintiff's submissions here there is no direct judgment against the plaintiff. Plaintiff's liability arises only by virtue of s. 96(1) Road Transport Act 1987. However, under that section there are certain defences available to the plaintiff and the plaintiff in this case intends to raise them at the appeal stage. Therefore, if the winding up petition is allowed to proceed with, then the plaintiff would be deprived of these defences. It is to be observed that the obligation of the insurer to pay the insured under s. 96(1) Road Transport Act 1987 is made subject to the section. The relevant part of the s. 96(1) reads: "... if after a certificate of insurance has been delivered ... judgment in respect of any such liability ... is given against any person insured by the policy, ... the insurer shall, subject to this section, pay to the person entitled to the benefit of the judgment any sum payable thereunder in respect of costs an any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments. (Bolden for emphasis). In my opinion the phrase "subject to this section" in s. 96(1) Road Transport Act 1987 means that the insurer's obligation to pay must be subject to any defences that the insurer may raise as provided for under sub-s. (2) of the section.

[18] It would be quite a different matter had the defendant commenced recovery action against the plaintiff and obtained judgment directly against the plaintiff. In my judgment, the proper thing to do is for the defendant to present the judgment obtained from the Sessions Court to the plaintiff as the insurer for the insured and demand for payment under s. 96(1) Road Transport Act 1987 based on its statutory obligation to pay. In the event the insurer refuses to pay for one reason or another, the claimant then may file for recovery action against the insurer under that section and obtain judgment directly against insurer. Then and

only then I would say that the claimant (the defendant in this case) is justified to present a 218 notice and subsequent a winding up petition against the insurance company. To allow otherwise I think would be an abuse of process and would be unfair to the insurance company which may want to challenge the judgment and invoke the defences available to it under s. 96(2).

[19] For the above reasons, I shall allow the injunction on *inter partes* application. Cost of this *inter partes* hearing is awarded to the Plaintiff and cost to be taxed unless agreed. I also want to make a note here that the Defendant has not filed any application to set aside the *ex parte* injunction; instead the defendant came straight away to argue in *inter partes* hearing that the *ex parte* injunction is unsustainable and should not be issued at all in the first place. In my view the absence of or non-filing of an application to set aside the *ex parte* in this case neither prejudice the plaintiff nor is it detrimental to the defendant. I say so because under O. 29 the court is bound to hear *inter parties* the *ex parte* application within 21 days of granting the *ex parte* order. At the hearing the burden is for the plaintiff to show that the granting of the *ex parte* is justified and therefore should be affirmed in the *inter parties* hearing. In any event, I would say that as a general rule the application under O. 29 Rules of the High Court 1980 should be made *inter partes*; and only when the case is of urgency (the emphasis is on the urgency of the case) that it may be made *ex parte*. Such application however must comply with the strict requirements of the Rules. Therefore, on this issue which was raised by the learned counsel for the plaintiff (though not seriously argued) I hold nothing against the defendant.